

Terry

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
ENVIRONMENTAL RESOURCES PROTECTION)
COUNCIL, INC.)
)
For Review of Order No. 89-121 of)
the California Regional Water Quality)
Control Board, Central Coast Region.)
Our File No. A-648.)
_____)

ORDER NO. WQ 90-6

BY THE BOARD:

On October 13, 1989, the California Regional Water Quality Control Board, Central Coast Region, (Regional Board) adopted Order No. 89-121 establishing waste discharge requirements for closure of existing surface impoundments at the Casmalia Resources Hazardous Waste Disposal Facility (Casmalia Resources or Discharger) in Santa Barbara County. On November 13, 1989, the Environmental Resources Protection Council, Inc. (ERPC or Petitioner) filed a timely petition for review of the Regional Board Order. ERPC amended the petition on December 18, 1989. Petitioner also requested a stay of the action. Because this Order resolves the issues on the merits, this Board will not address the stay request.

I. BACKGROUND

Casmalia Resources owns and operates a 252.3 acre hazardous waste management facility in Santa Barbara County near the town of Casmalia and City of Santa Maria. This facility is

located within an approximately 5,000 acre buffer area owned by Casmalia Resources. The facility first received a permit from the state to operate in 1972.

The facility has been used to dispose of a variety of hazardous and nonhazardous wastes including oil field waste, petroleum wastes, acid, caustics, organic chemicals, petroleum solvents, paint sludges, pesticides and other agricultural wastes, infectious wastes, septic tank pumpings, sewage sludge, and municipal wastes. Since 1972, the facility reportedly has received more than 3 million cubic yards of solids and 444 million gallons of liquids from numerous private and public generators. Solid waste has been disposed of in landfills. Liquids and sludges have been impounded. Units at the facility that have been or are being used for storage, treatment, or disposal of hazardous waste materials include six unlined landfills, 58 unlined surface impoundments, and 26 other units, including treatment units, disposal trenches, and disposal wells. Casmalia Resources stopped accepting offsite hazardous and nonhazardous wastes in November 1989. The Regional Board ordered Casmalia Resources to completely close the surface impoundments by July 1, 1990. (Cease and Desist Order No. 88-119) Casmalia Resources has removed fluids, sludges, and visibly contaminated solids from all of the 58 surface impoundments. Contaminated soil from the impoundments has been disposed of in several of the six landfills. Leachate from the landfills and impoundments and

contaminated ground water is now collected in collection trenches behind cutoff walls. The water is periodically pumped into tanks. The discharger is in the process of developing a system for treatment and disposal of this waste.¹

Ground water exists at varying depths below the site. In the northern portion of the site, it is as deep as 150 feet. In the vicinity of most of the surface impoundments, the level varies from springs at ground surface to a depth of about 40 feet. Ground water quality varies but generally exceeds the secondary drinking water standards because it contains high total dissolved solids². The ground water is not generally used for domestic purposes, but the Basin Plan for the Central Coast Region designates the ground water in the area as appropriate for domestic uses.

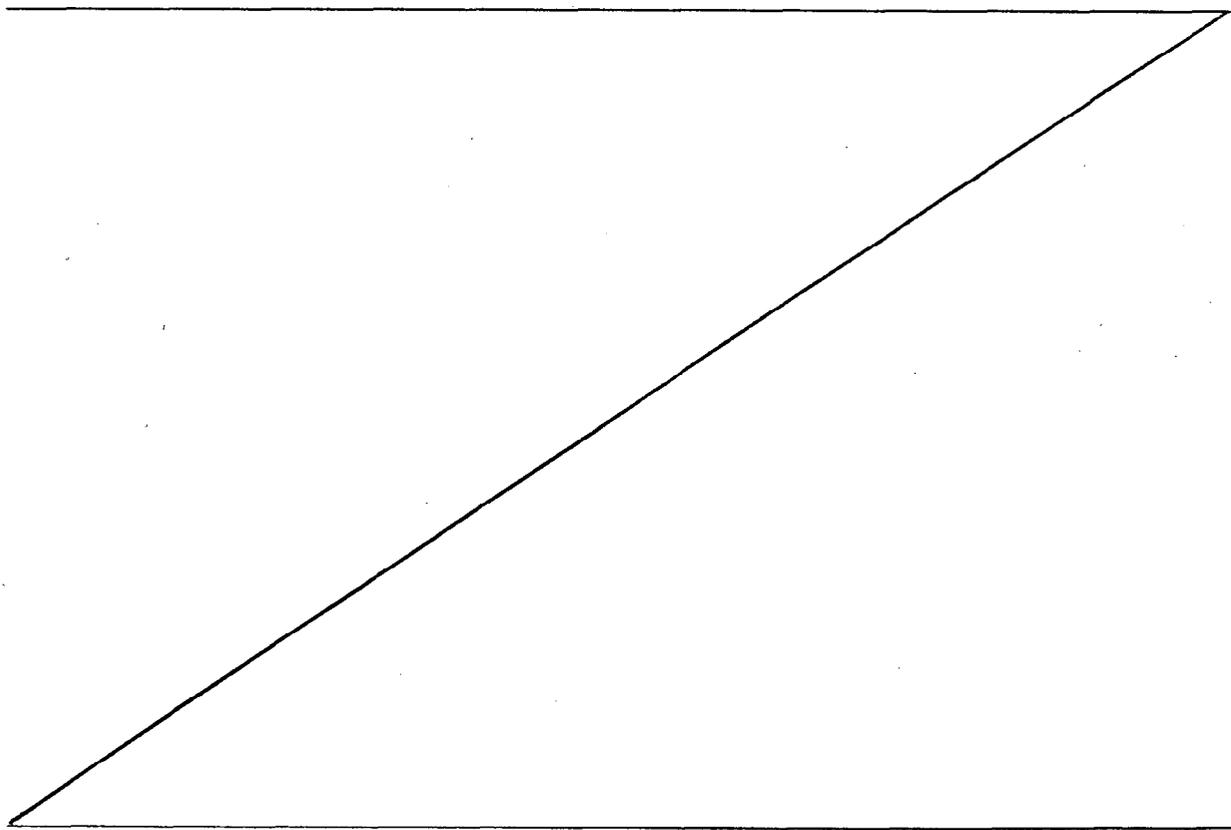
The facility is subject to regulation by several agencies including the Regional Board, the Department of Health Services (DHS), and the Environmental Protection Agency (EPA). DHS regulates the site under the state Hazardous Waste Control Act and DHS and EPA regulate the site under the federal Resource Conservation and Recovery Act (RCRA).³ DHS has prepared an

1 A bulk liquid solidification system has been proposed and tested, but was rejected by the Environmental Protection Agency. See Footnote 10 for further discussion.

2 A hydrogeologic investigation report prepared by the Discharger concluded that a majority of the surface impoundments to be closed are underlain by contaminated ground water.

3 42 U.S.C. 6901 et seq. DHS and EPA are in the process of reviewing Casmalia Resources' application for an operating permit under RCRA and state law.

Environmental Impact Report (EIR) as required by the California Environmental Quality Act (CEQA) concerning a project to modernize the facility to comply with federal and state regulations. The project analyzed in the EIR is a proposed modernization plan which would allow the disposal of contaminated soil from the surface impoundments into the operating unlined landfills, the closure of the existing surface impoundments, and the development of new triple-lined hazardous waste landfills, non-hazardous liquid containment facilities, and hazardous waste treatment systems. The project also includes proposals to dispose of treated disposal site runoff and contaminated ground water offsite, to conduct grading operations in two offsite borrow areas, and to construct a new drum handling facility.



The Regional Board has adopted numerous orders involving the Casmalia Resources facility.⁴ On October 13, 1989, the Regional Board adopted Order No. 89-121 approving, with certain modifications, a closure plan prepared by Casmalia Resources for closure of all existing surface impoundments.⁵ That Order is the subject of this petition. The Order states generally that Casmalia Resources must comply with the Toxic Pits Cleanup Act (TPCA); Title 23, Division 3, Chapter 15 of the California Code of Regulations (CCR); and related sections of Title 22 CCR, administered by DHS. The DHS regulations are

⁴ Waste Discharge Requirements Order No. 72-28 authorized Casmalia Resources to operate the original 61 acre facility consisting of 15 surface impoundments and one landfill. Order No. 72-28 has been amended several times, including once in 1975 (No. 75-73) to expand the project site to 179 acres, and in 1980 (No. 80-43) to expand the site to 252 acres. Other orders issued by the Regional Board include: (1) Waste Discharge Requirements for Exemptions to the Toxic Pits Cleanup Act (TPCA) (Order No. 87-194) that, when complied with, would allow for construction of five proposed new surface impoundments; (2) Cease and Desist Order No. 88-119 that addressed violations of the requirements of Order Nos. 80-43 and 87-194 and the TPCA; (3) Cleanup and Abatement Order (CAO) No. 88-76 which required Casmalia Resources to investigate ground water and submit a remediation plan; (4) CAO No. 89-60 which establishes interim target closure levels for cleanup of the surface impoundments; and (5) CAO No. 89-61 which addressed remediation of contaminated ground water affected by the surface impoundments and required further delineation of ground water contamination. CAO No. 89-61 also required the installation of several ground water collection trench systems and a source control trench for the existing landfills. Order No. 89-144 prohibited the discharge of wastes to the landfills, with certain exemptions. CAO No. 90-099 required implementation of a ground water remediation plan and repealed CAO No. 88-76, CAO No. 88-145 which revised CAO No. 88-76, CAO No. 89-61. Finally, Order No. 90-053 required closure of existing landfills.

⁵ Other waste discharge requirements that may be issued by the Regional Board include orders to allow offsite discharge of fluids from the disposal site and to allow construction of the new triple-lined waste management units discussed in the EIR as the Modernization Plan.

applicable to the closure of surface impoundments which have received hazardous wastes. These regulations provide two methods for closure: closure-in-place and closure-by-removal. (22 CCR Section 67316). Closure-in-place is available only if it can be demonstrated that contaminated subsoil can remain at a closed surface impoundment without posing a significant hazard. Otherwise, closure-by-removal is required. The closure plan, which was approved by the Regional Board, outlined a step-by-step approach to closure.

Initially, Casmalia Resources was to attempt to remove all contaminated soil to background levels. If this was not possible, they were to remove soils to a level that would not pose a significant hazard according to a modified version of EPA's Toxicity Characterization Leaching Procedure (TCLP). In addition to removal, the Discharger was required to develop ground water remedial measures for those impoundments underlain by contaminated ground water. Finally, if removal to background-- or no significant hazard level -- is demonstrated to be infeasible, Casmalia Resources was required by the Regional Board Order to submit specific closure-in-place plans for approval.

II. CONTENTIONS AND FINDINGS⁶

1. Contention: ERPC contends that the Regional Board's approval of the waste discharge requirements for closure (Order No. 89-121) was in violation of CEQA because the portion

⁶ Other contentions raised by petitioners are denied for failure to raise substantial issues [23 CCR Section 2052(a)(1)]; People v. Barry, 194 Cal.App.3d 158, 239 Cal.Rptr. 349 (1987).

of the EIR that discusses closure of the surface impoundments is inadequate. Furthermore, Petitioner asserts that a subsequent EIR is required.

Finding: The State Board does not have jurisdiction to determine whether the EIR complies with CEQA. The State Board must presume that the EIR is adequate because the petitioner has not shown that a subsequent EIR is required.

The review by a responsible agency (State Board or Regional Board) of whether an EIR prepared by a lead agency (DHS) complies with CEQA is governed by Sections 15185 and 15231 of the CEQA Guidelines.⁷ (14 CCR Sections 15185 and 15231) Section 15231 states that a responsible agency that was consulted by the lead agency in preparing the EIR must conclusively presume that an EIR is adequate unless (1) the EIR is finally adjudged in a legal proceeding not to comply with the requirements of CEQA,

⁷ One interested person has commented that CEQA Guideline Section 15185 requires the State Board to make a determination concerning the adequacy of the EIR and cannot presume it is adequate. See letter from David Nawi, Santa Barbara County Counsel, to Chairman Maughan and Board Members (October 2, 1990). Section 15185 requires the State Board, as the reviewing administrative agency, to consider the environmental document and make findings if appropriate concerning environmental effects in the same way as the Regional Board. However, the section does not require the State Board to make any specific determination. As evident in this Order, the State Board has considered the environmental document and has agreed with the Regional Board's findings. No additional findings are mandated by Section 15185.

or (2) a subsequent EIR is made necessary by 14 CCR Section 15162.⁸

For this project, DHS complied with 14 CCR Section 15082 because it consulted with the Regional Board in preparing the EIR. In addition, the EIR has not been challenged in a legal proceeding. Thus, the Regional Board must presume that the EIR is adequate unless a subsequent EIR is necessary.⁹

The petitioner contends that a subsequent EIR is necessary because new information concerning closure of the

⁸ Section 15231 states:

"A Final EIR prepared by a lead agency or a negative declaration adopted by a lead agency shall be conclusively presumed to comply with CEQA for purposes of use by responsible agencies which were consulted pursuant to Sections 15072 or 15082 unless one of the following conditions occurs:

(a) The EIR or negative declaration is finally adjudged in a legal proceeding not to comply with the requirements of CEQA, or

(b) A subsequent EIR is made necessary by Section 15162 of these guidelines."

See also Public Resources Code Sections 21167.2 and 21166.

⁹ An interested person to this petition has commented that the presumption specified in Section 15231 when read in conjunction with CEQA Section 21167.2 does not apply until the statute of limitations for filing a lawsuit challenging the adequacy of the EIR has run, i.e., until 30 days after the Lead Agency has filed a Notice of Determination. See letter from David Nawi, Santa Barbara County Counsel, to Chairman Maughan and Board Members (October 2, 1990). This interpretation is inconsistent with the plain language of Section 15231 of the regulations, which applies the conclusive presumption that the EIR is adequate without regard to the filing of a Notice of Determination by the Lead Agency. Adoption of this interpretation would, in effect, require the State Board to rewrite the regulation. It would also be inconsistent with other sections of CEQA concerning responsibilities of responsible agencies, including Public Resource Code Section 21174 and CEQA Guidelines Sections 15096(e) and 15052. Further, the State Board's interpretation is supported by the one forum principle stated in City of Redding v. Shasta County LAFCO (1989) 209 Cal.App.3d 1169, 257 Cal.Rptr. 793.

surface impoundments, not available prior to the approval of the Final EIR, has become available. The petitioner argues that the volume of contaminated soil and solidified leachate to be disposed of in onsite landfills is much greater than previously expected and much greater than can be accommodated in existing landfills. Therefore, this "new information" requires preparation of a subsequent EIR.

We conclude that no subsequent EIR is required concerning the issue of disposal of additional material in onsite landfills. Section 15162 requires the preparation of a subsequent EIR where new information of substantial importance becomes available.¹⁰ To require a subsequent EIR, the new information must have been unknown at the time the EIR was completed and must meet at least one of several conditions. Those conditions include (a) that significant effects were not previously discussed or (b) that those effects would be substantially more severe than shown in the EIR.

The information referred to by petitioner does not meet the conditions. First, the significant effects raised by petitioner were discussed in the EIR. The EIR identified the availability of sufficient onsite storage capacity as a significant environmental effect of closure. (EIR at 2-12; 5-73) The possibility that solidified leachate would be placed in onsite landfills was disclosed in the EIR. (EIR at 2-4) Since the effects were already discussed, a subsequent EIR would serve

¹⁰ Section 15162 also requires preparation of a subsequent EIR where there have been subsequent changes in the project or where substantial changes in circumstances have occurred. Issues concerning those conditions were not raised by petitioner.

no purpose. Second, significant effects previously discussed in the EIR will not be substantially more severe than shown in the EIR. Although mentioned in the EIR, solidified leachate will not be disposed of in the onsite landfills.¹¹ To date, almost all contaminated soil has been removed and sufficient volume remains in the onsite landfill. Disposal of solidified leachate and contaminated soil will not create a substantially more severe effect requiring preparation of a subsequent EIR.¹²

The State Board must conclusively presume that the EIR prepared by DHS complies with CEQA. The petitioner has not shown that new information exists requiring preparation of a subsequent EIR. Therefore, the State Board will not address the issues raised by petitioner concerning whether the EIR is in compliance with CEQA.¹³

11 In CAO No. 90-099, the Regional Board made a finding that because of federal land disposal restrictions, Casmalia Resources is prohibited from disposing of solidified leachate onsite:

"Pursuant to CDO No. 88-119, the Discharger constructed a Bulk Solidification (BLS) system for treatment of contaminated ground water. The Discharger had been unsuccessful in obtaining required permits necessary to operate the BLS system. Federal land disposal restrictions prevent placement of solidified hazardous waste into landfills which do not meet minimum technology requirements (MTR) after May 8, 1990. The Discharger currently has no MTR units and, therefore, cannot dispose of BLS system solidified material on-site." Finding 16.

12 The petitioner did not raise a concern about new information involving mitigation. See Section 15162(a)(3) and (4).

13 The petitioner contends that the Final EIR for the project was inadequate in that:

(1) the EIR did not adequately address alternative closure methods and mitigation measures; and

(2) the EIR did not discuss alternative closure methods that were adopted in the order.

2. Contention: The petitioner contends that the Regional Board's findings concerning mitigation and significant impacts violate CEQA because they are not supported by substantial evidence.

Finding: We conclude that the Regional Board complied with CEQA in adopting findings concerning mitigation and significant effects.

The responsibilities of the Regional Board concerning the adequacy of an EIR and mitigation are contained in Sections 15091 and 15096 of the CEQA Guidelines. The responsible agency must make findings required by Section 15091 concerning significant effects (14 CCR Section 15096(h)). Section 15091 of the CEQA Guidelines requires the Regional Board to make at least one of three findings for the significant effects identified in the EIR. One finding is that "changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR." (14 CCR Section 15091(a)(1)) The findings must be supported by substantial evidence. The Regional Board made the following findings:

(1) The closure of existing surface impoundments may generate substantially more contaminated subgrade material than anticipated and more material than can be disposed of in existing landfills. [EIR at 2-12; 5-73]

Finding 21.a.:

Changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR. Discharger has limited disposal of off-site waste in order to assure adequate

capacity for surface impoundment closure excavations. Additionally, most of the soil removal for closure has already been completed. Recent surveys conducted by the Discharger have indicated that sufficient volume has been reserved in the existing landfills to accommodate surface impoundment closure wastes. Discharger is required to report on continued availability of capacity for surface impoundment soils in the landfills.

(2) If clean-closure of existing surface impoundments is determined to be infeasible, areas with remaining contamination would be subject to possible alternative closure techniques. The proposed contingency plan for removal of contaminated material in these areas may rely upon excavations associated with the construction of future triple-lined landfills to remove remaining contaminated soil. [EIR at 2-12; 5-73]

Finding 21.b.:

Changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR. This Order provides that if Discharger cannot achieve cleanup target levels at one or more surface impoundments, it must report to the Executive Officer and demonstrate infeasibility to the satisfaction of the Executive Officer. A showing of infeasibility must consider all reasonable alternatives. Such demonstrations of infeasibility must be made on a unit-by-unit basis because conditions are likely to vary.

If Discharger demonstrates infeasibility, this Order requires Discharger to provide a detailed plan for alternative closure which must be approved by the Regional Board before it can be implemented. This Order requires surface impoundment cleanup and closure, regardless of new unit construction.¹⁴

¹⁴ The EIR also identified the following effect, but the Regional Board did not make findings concerning this environmental effect.

(3) Failure to remove soil and ground water contamination may impair the ability to effectively monitor the disposal site for signs of new contamination. (EIR at 2-22; 2-202; 2-209)

The petitioner contends that the findings made by the Regional Board are not supported by substantial evidence. Specifically, concerning the volume of closure material, the petitioner referred to statements in the EIR that there may not be sufficient space in existing landfills to accommodate the material. The EIR suggests that the surplus material may be placed in new disposal facilities or that impoundments with surplus material would be closed as landfills. The EIR also provides that the material must be disposed of in a manner approved by EPA and DHS and it states that Casmalia Resources has determined that sufficient disposal volume was available in onsite landfills. Petitioner argues that there is no reference to any factual data in the EIR to support the representation that sufficient capacity exists.¹⁵

We conclude that the Regional Board's finding concerning volume of closure material is supported by substantial evidence. The Regional Board based its finding on (1) a report

¹⁵ The petitioner also stated that there is insufficient capacity because EPA "has determined that Casmalia is already in violation of 40 CFR 270.71(a) for accepting landfill material in excess of the facility's design capacity. (EPA Determination of Violation, Compliance Order and Notice of Right to Request a Hearing, Count I, September 27, 1989.)" (Petition p.12: 19-21). However, despite the title of the order, EPA will not make a final determination until after a hearing and consideration of all the evidence. In addition, Count I of the Order does not allege that the physical capacity of the landfills has been exceeded. The alleged violation concerns an exceedance of the design capacity specified in the facility's RCRA Part A application, not an exceedance of the actual capacity of the landfill. Paragraph 33.c. of EPA's order authorizes the Discharger to place waste in the landfill until EPA notifies the facility that it must cease the discharges.

prepared in March 1989 by the Discharger, entitled "Landfill Volume Assessment," which calculated capacity based on topographic mapping, estimated volumes of closure material, and volume of foundation and cap material, and (2) actual data from closure activities. At the time the order was adopted, most soil removal had been completed and volume estimates at that point were accurate. The Discharger had made additional surveys which continue to support the conclusion that sufficient volume is available.¹⁶ In addition, as mitigation, the Discharger may not receive offsite waste and place it in the landfills used for disposal of onsite waste. The EIR also suggested other alternatives, including stockpiling waste onsite. Since that alternative would violate state and federal statutes and regulations, it was not adopted by the Regional Board.

The Regional Board's findings and the record demonstrate that it considered the factual evidence that was the basis for the information in the EIR and that it considered and imposed mitigation measures. See Citizens for Quality Growth v. Mount Shasta (1988), 198 Cal.App.3d 433, 441, 243 Cal.Rptr. 727. ("[T]he purposes of section [15091] are that there be some evidence that the alternatives or mitigation measures in the EIR actually were considered by the decision making agency and, . . . that there be a disclosure of the 'analytic route the . . . agency traveled from evidence to action.' [Citations.]")

¹⁶ The Staff Report prepared by the State Board's Division of Clean Water Programs concerning this petition concludes that "[a]ll available information indicates that there is sufficient landfill capacity at the facility for closure of the [surface impoundments] as estimated in the March 15, 1989 report." Staff Report at 12 [8/21/90].

The petitioner also contends that the finding regarding alternative closure techniques is not supported by substantial evidence. We disagree with petitioner's contention. The Regional Board's finding requires Casmalia Resources to demonstrate to the Regional Board that it is infeasible to achieve the target closure levels at any surface impoundment and to provide a detailed plan for alternative closure techniques that complies with applicable federal and state regulations. Compliance with environmental regulations is a reasonable mitigation measure. The Regional Board's action is adequate under CEQA because the order requires compliance with applicable state and federal regulations. In Sundstrom v. Mendocino County (1988), 202 Cal.App.3d 296, 308, 248 Cal.Rptr. 352, the court held that "[a] condition requiring compliance with environmental regulations is a common and reasonable mitigation measure." (See Perley v. Board of Supervisors (1982) 137 Cal.App.3d 424, 187 Cal.Rptr. 53.) Like the situation in Sundstrom, the Regional Board possessed "'meaningful information' reasonably justifying an expectation of compliance." 202 Cal.App.3d at 308.

The petitioner further argues that it is improper under CEQA to rely on mitigation measures to be adopted in a future study, citing Sundstrom. In Sundstrom, the permitting agency required the applicant to adopt mitigation measures to be recommended in a future hydrological study concerning impacts from a proposed irrigation system carrying reclaimed water. The court rejected that approach because project plans must incorporate mitigation measures prior to project approval. The

facts of that case are distinguishable from the situation at the Casmalia facility. In Sundstrom, the hydrological studies could have been performed prior to project approval. At the Casmalia facility, alternative closure plans cannot be evaluated until removal of contaminated soil is conducted at each surface impoundment. Such plans must comply with applicable regulations and must be unit-specific. Further, the Order does not actually approve the plans; they must be approved by the Regional Board. Additionally, the issue before the court in Sundstrom was whether the lead agency should have prepared an EIR rather than a negative declaration. The lead agency ordered the future hydrological study to determine the environmental effects of the project. The need for the study demonstrated to the court that an EIR was necessary. In this case, an EIR has already been prepared.

Finally, the petitioner criticized the Regional Board for failing to make findings regarding the impacts on monitoring of soil and ground water contamination in the event target closure levels are not achieved and new units are built. This criticism is not justified. Regional Board Order No. 89-121 addresses the closure of existing surface impoundments, not the construction of new units. Soil and ground water contamination are existing conditions at the facility. The EIR points out that those conditions may effect future monitoring for additional contamination if new units are built. Order No. 89-121 does not authorize construction of new units. Thus, the effect identified is not associated with the closure of existing units. The

Regional Board is not required to make findings concerning mitigation of a project it is not yet approving. (14 CCR Section 15096(g)(1).)

3. Contention: The petitioner contends that Order No. 89-121 does not comply with 23 CCR Sections 2581 and 2582(b)(1) (Chapter 15 - formerly Subchapter 15) because the Order authorizes the Discharger to leave contaminated soil in place at the impoundments and does not require those units to be closed as a landfill.

Finding: The applicable regulations regarding closure of surface impoundments which have received hazardous waste are contained in the DHS regulations and not our Chapter 15. The Regional Board's requirements regarding closure-in-place are consistent with these regulations. However, the provisions of the Regional Board Order must be modified as discussed below.

The petitioner's contention concerns closure of the surface impoundments required by Order No. 89-121. The petitioner raised two major arguments concerning the closure process. First, the petitioner argues that the Order violates Chapter 15 because it allows the Discharger to leave in place soils with metal concentrations above background where the soils have passed the Regional Board's test for leachable metals (the TCLP test). In petitioner's view, Chapter 15 requires the removal of all contaminated soil, unless the impoundment is closed as a landfill. Second, the petitioner argues that the Order violates Chapter 15 because it does not specifically require units containing contaminated soils (both those units

that meet the TCLP test and units that do not) to be closed as landfills.

Before addressing the petitioner's contention, we must clarify that Chapter 15 does not contain the only requirements applicable to closure of hazardous waste surface impoundments. The Regional Board's authority concerning closure of hazardous waste surface impoundments is found in Health and Safety Code Section 25205(b)¹⁷, the California Water Code Section 13227¹⁸, and 23 CCR Sections 2580(c) and 2597(d)¹⁹. Those provisions authorize the Regional Board to review and approve closure plans that comply with applicable federal and state regulations and are protective of water quality. Certain closure requirements of Chapter 15 (i.e., Section 2582) do not apply directly to Class I units. Regulations applicable to closure of Class I surface impoundments at Casmalia Resources are found in 22 CCR Section 67316 and 40 CFR Section 265.228. Thus, the Regional

¹⁷ Section 25205(b) specifies that any requirements imposed upon a facility by a Regional Board pursuant to Section 13227 of the Water Code must also be imposed upon the facility by DHS.

¹⁸ Section 13227 of the Water Code states that the Regional Boards shall review plans to "ensure that water quality is adequately protected during closure and the post-closure maintenance period." Further, it states that the Regional Board "shall approve the facility closure and post-closure plans if it finds that the plans comply with applicable state and federal laws and regulations relating to water quality protection and monitoring." Finally, the Regional Board may condition approval of plans based on requirements in the Water Code.

¹⁹ Section 2580(c) states that closure of Class II and Class III impoundments are subject to Subchapter 15 and Section 2597(d) states that the Regional Board shall approve maintenance plans and proposed construction and maintenance procedures for Class II and III surface impoundments, but only the water quality aspects of Class I units.

Board's order must comply with DHS and EPA regulations, but may include additional requirements, such as the Chapter 15 standards, to ensure that water quality is protected.

23 CCR Section 2582 and 22 CCR Section 67316 impose very similar requirements.²⁰ Generally, those regulations require the owner or operator to remove or decontaminate all waste residues and contaminated subsoils and manage them as hazardous waste. Contaminated material may remain in place, in

²⁰ 22 CCR Section 2582(b)(1) states:

"All residual wastes, including sludges, precipitates, settled solids, and liner materials contaminated by wastes, shall be completely removed from the impoundment and discharged to an approved waste management unit. Remaining containment features shall be inspected for contamination and, if not contaminated, may be dismantled. Any natural geologic materials beneath or adjacent to the closed impoundment that have been contaminated shall be removed for disposal at an appropriate waste management unit. If, after reasonable attempts to remove such contaminated materials, the discharger demonstrates that removal of all remaining contamination is infeasible, the water management unit shall be closed as a landfill pursuant to Section 2581 of this article."

22 CCR Section 67316 states in part:

(a) . . . at closure, the owner or operator shall remove or decontaminate all waste residues, contaminated containment system components (liners, etc.), contaminated subsoils and structures and equipment contaminated with waste and leachate, and manage them as hazardous waste. If hazardous constituents from contaminated subsoil at the facility can pose a significant hazard to public health or environmental quality by moving through soil or emitting toxic or flammable gas or vapor, and cannot reasonably be expected to decompose to a form that is not hazardous material, before closing the facility the operator shall remove all subsoil which contains waste contaminants.

(b) If it is demonstrated . . . that . . . contaminated subsoil can remain at a closed surface impoundment without posing a significant hazard to water quality, public health, domestic livestock, wildlife or the environment, the operator may leave such material at the surface impoundment [and] shall compact the liner material, settled solids, precipitate and other solids containing hazardous waste or hazardous material and shall" close as a landfill.

certain situations, if the surface impoundment is closed as a landfill. Section 67316(b) authorizes the use of alternative closure methods if the operator demonstrates that material remaining on site will decompose to a form that is nonhazardous and authorizes variances from certain requirements.

Having reviewed the applicable closure standards, we turn to petitioner's contentions. As for the argument that the TCLP test violates the applicable regulations, the question is whether compliance with Order No. 89-121 would satisfy 22 CCR Section 67316(a) and adequately protect water quality. As explained above, Order No. 89-121 requires Casmalia Resources to close the impoundments by removal if feasible and "in place" if not. (See Section I. Background.) Order No. 89-121 requires the Discharger to attempt to close each unit by removing all material with constituent concentrations above background. For impoundments with remaining soils with metal concentrations above background, the Order requires the Discharger to remove soils until the liquid extracts from those soils pass the Regional Board mandated cleanup levels using the modified TCLP method.²¹ Acceptable TCLP extract concentration levels established by the Regional Board must not exceed either the drinking water

²¹ The Regional Board's use of EPA's TCLP method differs from the normal use of the test. The test is normally used to determine if a waste is hazardous. In the standard procedure, the solid waste is agitated in an acidic solution and the resulting extract is analyzed for concentrations of a standard set of chemicals. The Regional Board's "hybrid TCLP" method requires the Discharger to use EPA's extraction method, but the extract solution is analyzed for more than just the standard set of chemicals and requires the Discharger to achieve lower target concentration levels.

standard, background water quality, or some other health-based standard. Further, the soils must first satisfy the total concentration limits, i.e., background levels, for herbicides, insecticides, cyanide, sulfide, VOCs, semi-Vocs, and benzene, toluene, xylene, and ethylbenzene (BTXE) before the modified TCLP method can be used on the residual soils.

The Regional Board has made the finding that if the soil satisfies their "hybrid TCLP" levels specified in the order, any leachate from that soil will not pose a threat to water quality. We agree that the Regional Board's use of the modified TCLP method generally would comply with applicable regulations concerning closure by removal and is a reasonable way to determine mobility of constituents. However, given the effectiveness of the leachate procedure and site-specific and unit-specific conditions, we conclude that use of the modified TCLP test requires additional review by the Regional Board. Order No. 89-121 should require the Regional Board to approve the use of the modified TCLP at specific impoundments. The choice of whether background or TCLP levels are to be met should not be left to the discretion of the discharger. In addition, samples collected for purposes of closure-by-removal must be the worst case, e.g., the pond bottom. When comparing to background samples to pond samples, the same test procedures should be used for each sample. If the Regional Board does not approve the use of the modified TCLP, then closure-in-place (i.e., closure as a landfill) will be required for those units.

The petitioner also argues that if contaminated soil remains at an impoundment, it must be closed as a landfill according to applicable regulations. However, the Order does not require closure as a landfill.

Order No. 89-121 requires Casmalia Resources to submit a report to the Regional Board's Executive Officer demonstrating why it is infeasible to obtain the target closure levels (i.e. background or TCLP levels). If the Executive Officer concurs with the demonstration of infeasibility, the Order requires Casmalia Resources to submit "impoundment specific post-closure plans" that comply with requirements specified in the Order. The Order refers to certain portions of 22 CCR Section 67316 (final cover design), but does not specifically require closure as a landfill.

We conclude that the Order must be clarified to require Casmalia Resources to close those surface impoundments (where they have demonstrated that it is infeasible to meet the target closure levels) as required by 22 CCR Section 67316(b) and provisions of Chapter 15 to protect water quality. Section 67316(b) specifies that where contaminated soil will remain (i.e. target closure levels are not achieved), the unit must be closed according to provisions that are equivalent to landfill closure requirements. (See 22 CCR Section 67418.) Section 67316 authorizes variances in certain situations.

III. SUMMARY AND CONCLUSIONS

1. The State Board does not have jurisdiction to determine whether the EIR complies with CEQA, because as a

responsible agency, it must presume the EIR is adequate since a subsequent EIR is not required.

2. The Regional Board complied with its CEQA responsibilities with regard to findings concerning mitigation and significant impacts.

3. The Regional Board must review and approve²² the use of the modified TCLP at individual units and must require compliance with applicable regulations concerning closure of surface impoundments that do not attain target closure levels.

IV. ORDER

IT IS HEREBY ORDERED that

(1) The first paragraph of Specification Paragraph 3 shall read as follows:

In accordance with EPA guidance document SW-846 and the Closure Plan (Figure H-1 and H-2), a minimum of four soil sample locations at each surface impoundment shall be sampled and analyzed to determine compliance with soil cleanup levels. Samples shall be taken from locations representing the "worst case". Samples shall be analyzed for the following:

(2) Specification Paragraph 4 of Waste Discharge Requirements Order No. 89-121 shall read as follows:

Individual soil samples collected within each impoundment shall not exceed the following target

²² The Regional Board has authority under Water Code Section 13223 to delegate such approval to the Executive Officer.

closure concentrations. If samples exceed the concentrations for inorganic constituents, additional soil removal or the TCLP²³ test may be conducted upon approval of the Regional Board. If the soil sample test results are less than all constituent concentrations shown below and upon approval of the Regional Board, no further excavation will be required.

(3) The table in Specification Paragraph 5 of Waste Discharge Requirements Order No. 89-121 shall be corrected as follows:

Total Chromium	0.13 mg/l
Chromium VI	0.05 mg/l

(4) Specification Paragraph 5 of Waste Discharge Requirements Order No. 89-121 shall read as follows:

Upon approval of the Regional Board, soil samples that do not meet the inorganic target closure levels specified in paragraph 4a. above, may be subjected to the TCLP, as prescribed by EPA, to determine the leachability of inorganic constituents exceeding target closure levels. Results of the TCLP test shall be compared to the levels of each inorganic constituent shown below. If the TCLP test result is less than the level shown below, the Discharger shall be deemed to have achieved target levels for inorganic constituents.

²³ For purposes of this Order, the Regional Board may approve an alternative to the TCLP test if found acceptable.

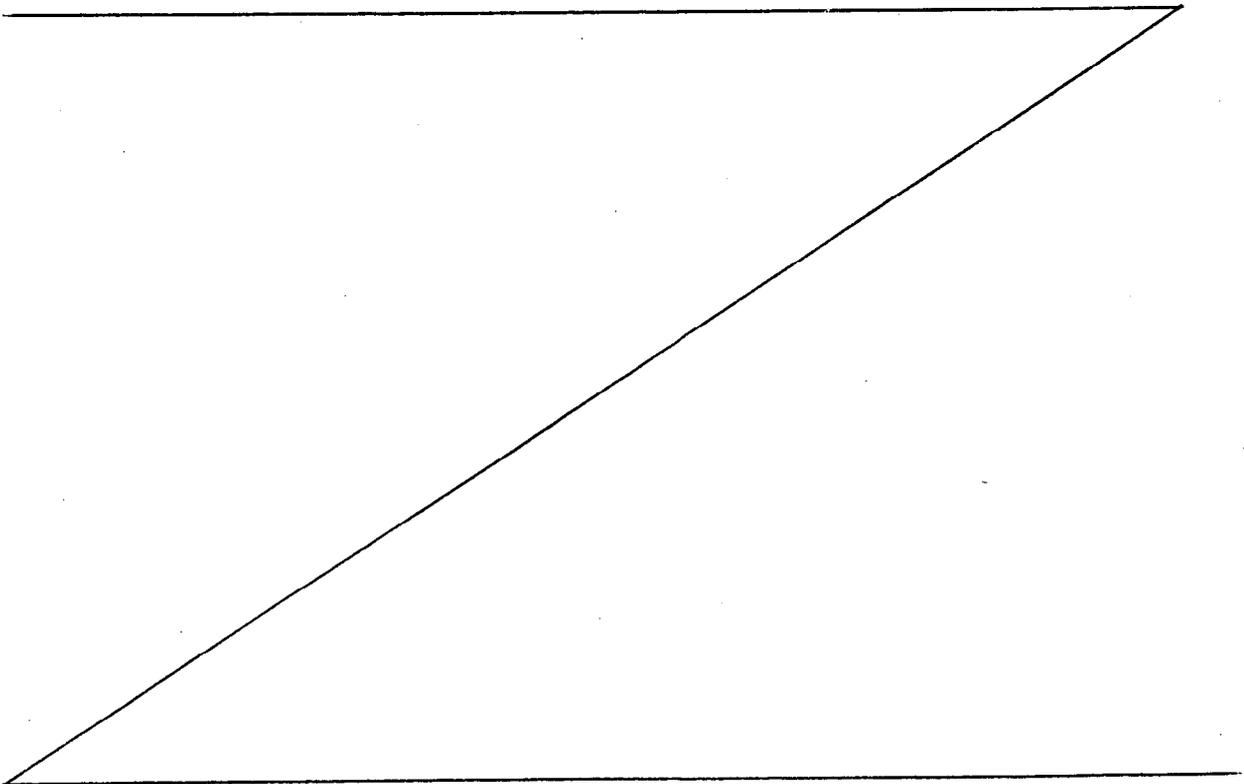
Upon approval of the TCLP test results, no further excavation will be required.

(5) Provisions Paragraph 4 of Waste Discharge Requirements Order No. 89-121 shall read as follows:

Following Executive Officer concurrence regarding infeasibility of achieving target closure concentrations, the Discharger shall submit an impoundment specific closure plan. Prior to implementation, the plan must be approved by the Board through an amendment to the closure waste discharge requirements. The plan must not depend on approval of new unit construction. The plan shall comply with the following requirements:

- a. The closure requirements of 22 CCR Section 67316(b), including variances where authorized by regulation.
- b. Toxicity, concentration, volume, and mobility of remaining contaminated materials shall be minimized to limit any present significant threat to water quality.
- c. Closure and post-closure maintenance shall provide for continued compliance with standards of waste containment applicable to the disposal of non-liquid hazardous wastes to land as specified in Chapter 15.

- d. Residual contaminated material shall not threaten to impair water quality, to adversely affect waters of the state for present or anticipated beneficial uses, or to create a condition of nuisance.
- e. Residual contaminated materials shall not drain liquids under foreseeable future conditions and shall be stabilized to a bearing capacity sufficient to support final cover.
- f. The plan must include a program for ground water monitoring in compliance with requirements specified by Article 5 of Chapter 15.



IT IS FURTHER ORDERED that in all other respects, the petition is denied.

CERTIFICATION

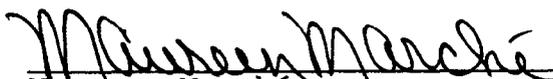
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 7, 1990.

AYE: W. Don Maughan
Darlene E. Ruiz
Edwin H. Finster
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

